No. 281

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HAROLD B. WILLEY, C

Supreme Court of the United States

OCTOBER TERM, 1953

STATE OF TEXAS AND THE RAILROAD COMMISSION OF TEXAS; CORPORATION COMMISSION OF OKLAHOMA; AND STATE OF NEW MEXICO AND OIL CONSERVATION COMMISSION OF NEW MEXICO, *Petitioners,*

v.

STATE OF WISCONSIN AND PUBLIC SERVICE COMMISSION OF WISCONSIN; CITY OF DETROIT, MICHIGAN; CITY OF KANSAS CITY, MISSOURI; CITY OF MILWAUKEE, WISCONSIN; COUNTY OF WAYNE, MICHIGAN; AND THE FEDERAL POWER COMMISSION, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN BEN SHEPPERD
Attorney General of Texas

CHARLES E. CRENSHAW
Special Assistant Attorney General

Attorneys for Petitioners State of Texas and Railroad Commission of Texas

MAC Q. WILLIAMSON
Attorney General of Oklahoma

FLOYD GREEN
Conservation Attorney for State of Oklahoma

Attorneys for Petitioner Corporation Commission of Oklahoma

RICHARD H. ROBINSON
Attorney General for New Mexico

GEORGE A. GRAHAM
Special Assistant Attorney General

L. C. WHITE
Attorneys for Petitioners State of New

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, interveners in the Court below, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit entered on May 22, 1953, in the cases numbered 11247, 11241, 11242, 11245 and 11252 on the Docket of said Court.

OPINION BELOW

The opinion of the Court of Appeals (R. 1857-1873) is not yet reported. The findings and opinion of the Federal Power Commission appear in the record at pp. 1682-1835.

JURISDICTION TO REVIEW

Jurisdiction of this Court is invoked under Title 15, United States Code, Section 717r(b), and Title 28, United States Code, Sections 1254(1) and 2101. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 22, 1953 (R. 1855).

STATUTE INVOLVED

The statute involved is the Natural Gas Act (Act of June 21, 1938, Ch. 556, 52 Stat. 821, as amended by Act of February 7, 1942, Ch. 49, 46 Stat. 83, and Act of July 25, 1947, Ch. 333, 61 Stat. 459, 15 U.S.C. Sec. 717, et seq.). The pertinent provisions of the Act are printed as Appendix A to this Petition.

SUMMARY STATEMENT OF THE MATTER INVOLVED

By order dated August 16, 1951, the Federal Power Commission (Commission) determined that Phillips is not a natural gas company within the meaning of the Natural Gas Act and that the Commission has no jurisdiction to regulate its rates (R. 1682-1755). This order resulted from an investigation upon the Commission's own motion to determine (1) whether Phillips is a "natural gas company" within the meaning of the Act and (2) if so, whether any of its rates subject to the jurisdiction of the Commission are unjust or unreasonable. By order dated April 16, 1951, the

Commission limited the investigation to the single question of whether Phillips is a "natural gas company" (R. 1671-1680).

Because this investigation threatened to bring sales by independent producers and gatherers of natural gas in interstate commerce for resale under regulation by the Commission, which would result in serious conflict or interference with the exclusive conservation powers and duties of producing states, Petitioners intervened in the proceeding before the Commission and the Court below, urging that such sales are exempt under Section 1(b) of the Act.

Petitioners are vested, under the laws of the States of Texas,[1] Oklahoma[2] and New Mexico[3] with the jurisdiction, duty and authority to administer and enforce the laws of their respective States with respect to the development, production, gathering, conservation, marketing and utilization of the oil and gas resources of the state. Petitioners' statutes and regulations constitute a comprehensive program of regulation of the production and gathering of natural gas, including the unitization of fields, proration, ratable taking, well spacing, drilling of wells, and all matters looking toward the conservation and greatest ultimate recovery of natural gas. Also included is the regulation of the price of gas where such regulation is conducive to the furtherance of State policies and programs with respect to conservation.

Likewise urging that regulation of Phillips' rates would be inconsistent with and would seriously inter-

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[1] Title 102, Revised Civil Stat. of Texas, 1925 (as amended).

[2] Title 52, Okla. Stat., 1951.

[3] Chapter 69, New Mexico Stat., 1941.

fere with their regulation, the producing states of Arkansas, Kansas, Louisiana and Mississippi also intervened in the proceeding before the Commission in opposition to the Commission's jurisdiction. The Commission, however, excluded the evidence offered by those states upon the ground that no gas involved in this particular proceeding was produced in those states. Intervening in support of the Commission's jurisdiction were, among others, the five petitioners in the court below, *i.e.*, the State of Wisconsin, the Public Service Commission of Wisconsin, City of Detroit, Michigan, City of Kansas City, Missouri, City of Milwaukee, Wisconsin, and County of Wayne, Michigan.

The Commission's investigation focused on Phillips' sales of natural gas to five natural gas companies, which companies are subject to the jurisdiction of the Commission under the Natural Gas Act, *i.e.*, Michigan-Wisconsin Pipe Line Company, Panhandle Eastern Pipe Line Company, Cities Service Gas Company, Independent Natural Gas Company, and El Paso Natural Gas Company. All of the gas so sold by Phillips is produced in part and purchased in part from other producers and moved through one of several systems of pipe lines, known in the industry as "gathering lines" (R. 365-374), to one of several gasoline plants, all located in the particular field where the gas is produced (R. 1215, 350, Exhibit 82).

At these gasoline plants Phillips processes the gas for the extraction of the liquid hydrocarbons and for the removal of impurities to make the gas salable. From the record, it is found that approximately 50% of the gas processed by Phillips is casinghead gas, or gas produced from oil wells in conjunction with

oil.[4] The production of oil is the controlling element in the production of this gas (R. 322). Most of such gas is not produced by Phillips but is purchased on a form of contract which expressly makes the purchase of casinghead gas subservient to the production of oil and requires Phillips to return the residue gas to the producer for use in lease operations. Under these contracts, Phillips is permitted to sell only that part of the gas which is surplus, or not returned to the oil producers (R. 1158-1177, 339). The price which Phillips pays under these contracts depends in part upon the gasoline content and in part upon the price which Phillips receives for the sale of the residue gas (R. 361-362). After processing, the residue gas which is available for sale is then delivered to various purchasers and substantial quantities are used by Phillips, but predominantly the residue is delivered to the purchasing pipe line companies at the exhaust of the gasoline plants (R. 282, 292-293, 628, 1216-1223, 355, 1240, 1245, 3640). In all these operations as they have been carried out in their respective states, Petitioners have for many years regulated Phillips. In addition, Phillips has always been regarded by Petitioners as an independent producer, gatherer and processor of natural gas (R. 486-487).

On the basis of the record as a whole, which consisted of almost 10,000 pages, the Commission found

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[4] Exhibits 169-177, R. 1298-1639, are copies of the reports required by the Railroad Commission of Texas and the Oil Conservation Commission of New Mexico to show the volumes processed at the various plants. These reports show the comparative volumes of casinghead gas and gas well gas processed in each plant. The volumes of gas delivered to Cities Service Gas Company, which is all casinghead gas (R. 291), are described in the testimony of George C. Roth (R. 282-284).

that Phillips' sales of gas, and the movement and processing of the gas which precede the sales, are all a part of or incidents of or activities related to its gathering business within the meaning of the production and gathering exemption of Section 1(b) of the Act and that the Commission therefore had no jurisdiction to regulate the sales (R. 1682-1755).

The Commission, paraphrasing this Court's language in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 690 (1947), found as a fact upon substantial evidence presented by Petitioners, that FPC regulation of Phillips' sales would be inconsistent with or would substantially interfere with State regulation by the states in which the gas is produced. This was the sole ground upon which Commissioner Draper concurred with the majority (R. 1753-1755). Commissioner Buchanan dissented (R. 1755-1835).

The Commission therefore found that Phillips is not a natural gas company within the meaning of the Natural Gas Act and ordered the proceeding terminated. Upon review, the Court of Appeals for the District of Columbia, by a 2 to 1 decision, reversed the order of the Commission, and directed the Commission to proceed to regulate Phillips' sales of gas (R. 1865).

QUESTION PRESENTED

Whether sales of natural gas to interstate pipe line companies by an independent producer and gatherer, consummated by delivery as the last step in the gathering process, are subject to regulation by the Federal Power Commission under the Natural Gas Act, where the Commission finds upon substantial evidence that

the sales were made during the course of production and gathering and that its regulation of such sales would be inconsistent and would substantially interfere with state regulatory functions with respect to production and gathering.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING THE PROPER INTERPRETATION OF THE NATURAL GAS ACT WHICH THIS COURT HAS NOT DECIDED BUT SHOULD DECIDE.

The decision of the Court of Appeals to the effect that sales by independent [5] producers and gatherers of natural gas in interstate commerce for resale are subject to regulation by the Federal Power Commission presents a question of grave, general importance and a question of substance relating to the construction and application of the Natural Gas Act which has not been, but should be, settled by this Court. Indeed the question was specifically reserved by this Court in *Interstate Natural Gas Co.* v. *Federal Power Commission,* 331 U.S. 682, 690, note 18 (1947).

Moreover, by a 2 to 1 decision the Court of Appeals has overturned a 4 to 1 decision by the Commission which adhered to the Commission's consistent construction of the Natural Gas Act since its enactment in 1938 to the effect that it had no jurisdiction of sales by independent producers and gatherers. For the Commission's summary of these actions, see R. 1720-

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[5] An independent producer and gatherer is one not owning or operating a transmission line and not affiliated with a company which does.

1728.[6] The consequences of the decision of the court below are not confined to the operations of Phillips Petroleum Company. The reasoning of the decision is such that it seems likely that it will lead to federal regulation of all sales made by independent producers and gatherers in interstate commerce for resale at the end of their gathering operations. There are more than 2300 such producers who sell directly to interstate transmission companies which are natural gas companies within the meaning of the statute (R. 728-729). The extension of federal regulatory power involved may be illustrated by contrasting the number of these gatherers with the 140 natural gas companies presently subject to Federal Power Commission regulation.[7]

In addition the decision below affects directly and substantially the interests of the producing states, because, as is shown at pp. 9-17, *infra,* the extension of federal regulatory power to sales made in the field by independent producers and gatherers will inevitably conflict with and render ineffective state conservation programs and policies. Finally, both because of this impairment of state conservation measures and because federal regulation will discourage independent

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[6] For the cases themselves, see: Re Columbian Fuel Corp. 2 F.P.C. 200 (1940); Re Billings Gas Co. 2 F.P.C. 288 (1940); Re Interstate Natural Gas Co., Inc., 3 F.P.C. 416 (1943); Re The Fin-Ker Oil and Gas Production Co., 6 F.P.C. 92 (1947); Re The Chicago Corporation, 6 F.P.C. 98 (1947); Re Kansas-Nebraska Gas Co., Inc., 6 F.P.C. 664 (1947); Re. J. R. and D. E. Whelan, 6 F.P.C. 672 (1947); La Gloria Corporation, 7 F.P.C. 349 (1948); Superior Oil Company, 7 F.P.C. 627 (1948); General Crude Oil Company, 7 F.P.C. 1024 (1948).

[7] Statistics of Natural Gas Companies, U. S. Government Printing Office, 1951, pp. 501-502.

producers and gatherers from selling gas in interstate commerce, the extension of federal control required by the decision below will ultimately have a serious effect on the interests of consumers by reducing the supply of natural gas available for their use (R. 428-430).

2. REGULATION BY THE FEDERAL POWER COMMISSION SUCH AS DECREED BY THE COURT BELOW WOULD SUBSTANTIALLY CONFLICT WITH STATE REGULATORY POWERS.

The sales which the Court of Appeals here ordered should be regulated by the Federal Power Commission are undeniably made in the respective fields of production located in Texas, Oklahoma and New Mexico. The sales are beyond question sales by a producer. That company also gathers in the same field gas purchased from other producers and sells that gas along with its own produced gas. The amount which it receives for the gas sold will not only affect it as a producer but will also affect other producers in the field whose gas it gathers. If the sales here involved are subject to regulation, then other sales made in the field by other producers and gatherers would likewise be subject to regulation. Each of these petitioners, the States of Texas, Oklahoma and New Mexico, established by detailed evidence that regulation by the Federal Power Commission of field sales such as are here involved would substantially interfere and conflict with their regulatory powers (Texas: R. 375-520, 557-592; Oklahoma: R. 602-619; New Mexico: R. 521-557). The Federal Power Commission expressly so found (R. 1745-1747). The ways in which the conflict will come about include the following:

Conservation Policies Relating to Price

Petitioners are each concerned with the conservation of gas. Each is acutely aware of the direct relationship between price and conservation.[8] Petitioners' policies with respect to this relationship differ, but there can be no doubt that regulation of producers' and gatherers' prices by the Commission will collide with, and substantially interfere with and hinder, Petitioners in the furtherance of their respective policies and programs.

One of the methods by which Oklahoma maintains the proper relationship between price and conservation is through the establishment of the minimum price at which gas may be produced. On December 9, 1946, long before this proceeding was instituted, Oklahoma found it necessary, as a means of preventing waste, to prescribe the minimum price at which gas may be

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[8] Concerning this relationship, the Federal Power Commission found:

> "... there is a direct relation between price and conservation, an important concern in the regulation of each of the states. Even though a producer be allowed a reasonable return on actual legitimate investment, our fixing of maximum rates for his sales would run counter to State conservation efforts, through the fixing of minimum well-head prices or otherwise, to insure maximum recovery of gas prior to abandonment of the well. For the higher the profit, the longer it is economical to operate the well. And to the extent that the producer could obtain a profit higher than that permissible under our maximum-price regulation, the longer abandonment would be postponed. Similarly, the higher the price paid to the producer and gatherer, the easier it becomes for the State to discourage by regulation the flaring of gas and to encourage the gathering and marketing of such gas. This is particularly true as to casinghead gas."

produced from the Guymon-Hugoton Field (R. 1266-1276). That order was sustained by this Court.[9] Some of the very sales involved in this case are covered by the Oklahoma minimum price order.[10]

The conflict with state authority in those instances where such minimum prices are fixed is obvious. It is no less obvious in those instances where the state chooses, as Texas and New Mexico have done, to let free competition control.

The progress made in recent years toward greater conservation has been the result of pioneering experimentation on the part of the states. What is adopted by one state may not always be adopted by another. Moreover, one state's policies or programs may prove unwise in another. Minimum prices may be the proper step toward greater conservation or they may not. At all events, it is a matter for each state to decide.

The representatives of Texas and New Mexico testified that those states have thus far found free competition to be the most effective agent in maintaining proper price levels for maximum conservation (Texas: R. 462-465; New Mexico: R. 556-557), although New Mexico's Commission has the authority to fix minimum prices in the event they become necessary (R. 532-533). Regulation of producers' and gatherers' prices by the Commission is as much an interference with this policy as with Oklahoma's minimum prices. In either case, the result of the Court of Appeals' decision is that control of this cornerstone of conservation is to be taken from the states and put in a federal

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[9] Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179 (1950).

[10] Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190 (1950).

agency whose duties do not encompass conservation.

An argument made in the Court of Appeals by those in favor of the Commission's regulation will undoubtedly be made again in this Court. That argument says that even where minimum prices are fixed there can be no conflict until the Commission has set a rate lower than the minimum prescribed by Petitioners. The fallacy of the argument becomes apparent when it is recognized that it is the *existence* of conflicting powers, not how they are exercised, which denies jurisdiction to the Commission.

Otherwise the absurd result would follow that for the Commission to find that it has no jurisdiction, it must first have exercised that jurisdiction. This Court has recognized the fallacy of any such rule for determining the existence of a conflict.[11]

This Court has said that the test of the Commission's jurisdiction is conflict "present or *threatened.*"[12] The Court of Appeals' decision shows on its face that conflict with Petitioners' programs and

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[11] In Bethlehem Steel Co. v. New York Labor Rel. Bd., 330 U.S. 767, 775-776 (1947), this Court said:

> "But the power to decide a matter can hardly be made dependent on the way it is decided. * * * If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act must either follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the Federal board had acted in the same case. But we do not think that a case by case test of Federal supremacy is permissible here."

[12] Interstate Natural Gas Co. v. Federal Power Commission, 331 U.S. 682, 692 (1947).

policies is not only "threatened," it must necessarily follow.

Unit Operation

Only a little over a year ago, this Court upheld an Oklahoma order prescribing compulsory unitization of a common reservoir.[13] One of the sales involved in this case, that to Cities Service, is of gas produced from the West Edmond Hunton Lime Unit, created pursuant to the same statute (R. 1577, 7427-7433).

Oklahoma has adopted compulsory unitization;[14] Texas and New Mexico have adopted voluntary unitization subject to the approval of their respective Commissions.[15] In both Oklahoma and Texas, one of the facts which must be found by the state regulatory agencies before unitization is required or approval is given is that the value of the additional oil and gas to be recovered will exceed the added cost of such method of operation.[16] In all three States, the basis of exercising this power is to prevent waste. Thus, if the Federal Power Commission is to regulate the price that can be received by producers and gatherers from such an operation, such control would no doubt be the determining factor to the complete exclusion of a determination by the States.

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[13] Palmer Oil Corp. v. Amerada Petroleum Corp., 343 U.S. 390 (1952).

[14] Sec. 287.1 et seq., Title 52, Okla. Stat. 1951.

[15] Art. 6008b, Revised Civil Stat. of Texas, 1925; Sec. 69-213½(e), Secs. 8-1138, 1139, New Mexico Stat. 1941 (1951 Cum. Supp.).

[16] Section 287.3, Title 52, Okla. Stat., 1951; Section 1, Art. 6008b, Revised Civil Stat. of Texas, 1925 (as amended).

Unitization has proved that great possibilities lie ahead in its use to the end that the maximum recovery will be obtained. Its further use would be seriously confused and curtailed if the Commission is authorized to regulate producers' and gatherers' rates, particularly if the Commission should persist in fixing rates on a strict cost basis, thus setting different rates for each unit lessee.

Proration

Under the applicable statutes, Petitioners limit the production of gas to the market demand.[17] Under these statutes the entire market demand is prorated among all the producers in the field and no one producer can be assured of being able to supply his own market from his own production. The result is the absolute necessity for a free interchange or interconnecting of gas among the producers in the field in order to assure each purchaser's ability to obtain the gas he needs to supply his demands. Such free interchange is practical only where producers may sell to any market without fear of being regulated as a natural gas company. Extraneous factors such as whether the sale will be a sale for resale in interstate commerce subject to regulation and whether, once having begun a temporary sale to supply the short-term needs of an interstate transmission company, the sale may be abandoned without the consent of the Federal Power Commission, will serve only to hinder and restrict the effectiveness of Petitioners' proration policies.

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[17] Art. 6008, Revised Civil Stat. of Texas, 1925 (as amended); Section 239, Title 52, Okla. Stat. 1951; Section 69-213, New Mexico Stat., 1941 (1951 Cum. Supp.).

This interconnecting of gas in many instances may be prompted by Petitioners' regulations. For example, the Texas Railroad Commission may shut in a producer who has an excess allowable over his market demand if it is found that such producer refuses to sell his gas at a reasonable price to a producer who has less allowable than his market demand.[18] Fixation of prices by the Federal Power Commission would usurp the Railroad Commission's functions in situations of this kind.

Ratable Taking of Gas

The protection of correlative rights of owners of gas in a common reservoir is made possible through Petitioners' authority to require ratable taking. An example of the necessity for the enforcement of ratable taking is to be found in this Court's decision in *Republic Natural Gas Company* v. *Oklahoma,* 334 U.S. 62 (1948).

The questions raised in that case demonstrate that, lacking authority with respect to the price, terms and conditions of the taking of the gas, the authority to regulate ratable taking as between producers, takers and purchasers would be ineffective. To give the Federal Power Commission control over the price would be to take from Petitioners an essential element of the effectiveness of their regulation.

Saving of Casinghead Gas

One of Petitioners' most difficult problems is the elimination of the wastage of casinghead gas. Since casinghead gas is produced as and when oil is pro-

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[18] Sec. 20, Art. 6008, Revised Civil Stat. of Texas, 1925.

duced, it must be gathered and marketed immediately. Gas well gas, which can be kept in the ground until needed, must not be allowed to fill markets which can be effectively served by the use of casinghead gas. In the past, billions of cubic feet have been wasted. Texas has found it necessary on some occasions to require that entire oil fields be shut in until a gas market is developed, in order that the flaring of casinghead gas may be stopped.[19] To do this, extensive and expensive gathering lines must be laid and in most instances costly processing plants must be built in the field.

Petitioners' efforts have substantially reduced the wastage of casinghead gas. The success of these efforts has been due in a large measure to the fact that the price of gas has increased to the extent that it has made the operations economically feasible (R. 438). To give the Federal Power Commission jurisdiction to limit the price of gas will seriously interfere with Petitioners' efforts to prevent the waste of casinghead gas.

Well Spacing

An important part of Petitioners' duties is the establishment of well spacing, which is very materially influenced by the economics involved. The record in this proceeding shows that Petitioners' well spacing activities are greatly affected by the "price of gas" (R. 515, 606, 609).

Any action by the Commission regulating the price of gas would thereby, in a large measure, control and interfere with what Petitioners can do in respect to well spacing.

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[19] For an example, see *Railroad Commission* v. *Sterling Oil & Refining Company*, 147 Tex. 547, 218 S. W. 2d 415 (1949).

Conservation Generally

In its opinion, the Commission pointed out the direct relationship between price and conservation (R. 1745-1747). The evidence in this case is more than sufficient to show that such a relationship does exist. Each of Petitioners' representatives so testified (Texas: R. 437-439, 575; Oklahoma: R. 605-607, 609-611; New Mexico: R. 532).

One of Petitioners' foremost objectives is to prevent waste and secure the greatest ultimate recovery. To abandon gas still in the ground is one of the most obvious forms of waste, but the amount of gas that will be produced from any given reservoir depends to a great extent upon the price. A low price means that marginal wells will not be drilled. The manner in which a well is equipped and the length of time it is produced are controlled by economics. Price is the determining factor.

The evidence of the unavoidable conflict between the regulation by the Federal Power Commission of the sales here involved and the regulatory powers of these Petitioners is clear and overwhelming.

Under such circumstances, the jurisdiction of the Commission does not attach.

3. THE COURT BELOW ERRED IN REFUSING TO GIVE EFFECT TO THE COMMISSION'S FINDING THAT ITS REGULATION OF PHILLIPS' SALES WOULD CONFLICT AND SUBSTANTIALLY INTERFERE WITH STATE REGULATORY AUTHORITY.

Although decisions of this Court involving sales by transmission companies are not controlling in respect to sales by independent producers and gatherers, the limitation on FPC regulation of sales by transmission

companies as expounded by this Court will of course apply to sales by independent producers and gatherers, if such sales are subject to FPC jurisdiction under any circumstances. In *Interstate Natural Gas Co.* v. *Federal Power Commission*, 331 U.S. 682, 690 (1947), this Court, in dealing with sales made by a transmission company, and in speaking of the provisions of Section 1(b) that the Act should not apply to production or gathering, said:

> "*The purpose of that restriction was, rather to preserve in the States powers of regulation in areas in which the States are constitutionally competent to act.* Thus the House Committee Report states: '*The bill takes no authority from State Commissions, and is so drawn as to complement and in no manner usurp State regulatory authority . . . .*' Clearly, among the powers thus reserved to the States is the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the States full freedom in these matters. *Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction of the Federal Power Commission does not attach.*"[20]

[20] All emphasis in quotations is supplied.

It is noteworthy that two of the Petitioners here (Texas and Oklahoma) filed briefs and presented oral argument in the *Interstate* case in this Court. Fear was expressed that under the decision of the Fifth Circuit Court (156 F. 2d 949) sales by independent producers and gatherers would be regulated (Transcript of oral argument, p. 35-50). One of the grounds urged in opposition to regulation of sales made during production and gathering was that such regulation would conflict and interfere with state regulatory authority.

The Federal Power Commission was emphatic in denying in its brief and in oral argument (Brief, p. 18; oral arg. p. 59, 80, 81, 83), that regulation of sales by a transmission company such as Interstate would result in regulation of sales by independent producers and gatherers. This Court was careful to point out that in holding Interstate's sales subject to regulation, it was not passing upon sales made by independent producers and gatherers (331 U.S. at p. 690, note 18). Yet as we interpret the Court of Appeals' construction of the above-quoted language from the *Interstate* case wherein this court stated the circumstances under which jurisdiction of the Federal Power Commission does not attach, that Court holds that a sale is subject to regulation if consummated by delivery as the last step in gathering *even if conflict between federal regulation and state regulatory authority is shown*, and that in order to obtain the benefit of the rule laid down in the *Interstate* case, a sale must be made *before* rather than simultaneously with the completion of gathering. Under this test the sale is subject to regulation unless followed by more gathering. Since the greater part of all gas gathered by independents is sold at the end of the process, this

misinterpretation has the effect of subjecting the great bulk of the gathering business to federal regulation. Thus by an unrealistic and impractical interpretation of the language of this Court, the court below transformed the rule of law intended to protect the interests of the states into a rule of law that will permit defeat of their conservation measures.

A. THE COMMISSION'S FINDING THAT THE SALES WERE MADE DURING THE COURSE OF PRODUCTION AND GATHERING SHOULD BE ACCEPTED BY THE COURTS.

The Commission found that Phillips' sales are a part of production and gathering (R. 1744) and that they are made " 'during the course of production and gathering' " (R. 1745). It also found that Phillips' gathering operations included the movement through "the relatively short line leading from the point where processing is partly or finally completed, to the various points where sale or delivery or both takes place" (R. 1743).

The Court of Appeals, however, concluded that "Phillips sells the gas after the time and beyond the place at which production and gathering are complete and after processing has intervened,"[21] and therefore the question of conflict with State regulation is immaterial.[22]

The Court of Appeals brushed aside the evidence which supports the Commission's findings by holding that what constitutes gathering is a question of law. In so holding, the Court erred and failed to give the

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[21] R. 1857.

[22] R. 1863 note 11.

Commission's finding the finality to which it is entitled.[23]

The words "production or gathering" having been used in reference to a business should be given their meaning as understood by the industry to which they apply.[24] As this Court said in *United States* v. *Maher,* 307 U.S. 148, 155 (1939), "The recognized practices of an industry give life to the dead words of a statute dealing with it."

How those words are understood in the industry is undoubtedly a question of fact. All parties proceeded on that theory and introduced testimony before the Commission bearing upon that fact (R. 311, 368-369, 680-681, 691, 699-700). There being substantial evidence to support the Commission's finding, the Court should accept it.[25]

Emphasis to this rule may be drawn from the power given to the Commission to define "trade terms used in this Act."[26] "Production and gathering" are undoubtedly trade terms.

Whether the determination of what constitutes production or gathering is to be made by applying the

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[23] Sec. 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), provides:

> "The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."

[24] See O'Hara v. Luckenbach S. S. Co., 269 U.S. 364, 370 (1926); Order of Railway Conductors v. Swan, 329 U.S. 520 (1947); Carter v. Liquid Carbonic Pacific Corp., 97 F. 2d 1 (9th Cir. 1938); Roberts v. Tenn. Coal, Iron & R. Co., 255 Fed. 469 (5th Cir. 1919) cert. denied 250 U.S. 659; 50 Am. Jur. p. 265, Sec. 277.

[25] Natural Gas Act, Sec. 19(b), 15 U.S.C. 717r(b).

[26] Natural Gas Act, Sec. 16, 15 U.S.C. 7170.

terms of the statute to uncontroverted facts or by resolving disputed facts, the application of the statute is entrusted to the expert judgment of the body charged with its administration, and the only function of a reviewing court is to determine whether the Commission's interpretation has "warrant in the record and a reasonable basis in law." *Gray* v. *Powell,* 314 U.S. 402 (1941). It does not matter that the interpretation made by the administrative agency differs from the one the Court would have made.[27]

Further, considering that what constitutes "gathering" is a question of law, the decision of the Court of Appeals is out of harmony with this Court's decision in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.,* 337 U.S. 498 (1949), where it was said that the term "production or gathering" should not be construed narrowly, but should be construed to exclude from regulation by the Commission matters incident or related to those functions. Applied to the *Interstate* case, this means that "during the course of" includes not only everything done from the beginning to, and including, the end of production and gathering, but everything incident or related to those functions as well. Certainly this would include a sale as the end product of production and gathering, exactly as was found by the Commission in its order (R. 1744).

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[27] Unemployment Compensation Commision v. Aragon, 329 U.S. 143, 153, 154 (1946); Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 478 (1947).

B. THE STATES HAVE THE POWER TO REGULATE PHILLIPS' ACTIVITIES AS A PRODUCER AND GATHERER.

Although we can't be certain that the Court's statement (Opn. p. 8) that "no state can regulate these sales" was intended to bear upon its treatment of the conflict of powers point, we shall assume that it was so intended.

The Court was clearly in error in making that statement. *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.*, 340 U.S. 179 (1950). In any event this Court's opinion in the *Interstate* case shows beyond question that the power of the State to regulate the particular sale is *not* the controlling test. If regulation by the Federal Power Commission will be inconsistent or substantially interfere with the States in their regulation of even the *physical* activities or any phase of production and gathering within the power of the States to regulate, then the Commission's jurisdiction does not attach.

In its opinion, in the *Interstate* case, this Court said:

> "*Clearly among the powers thus reserved to the State,* is the power to regulate the *physical* production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern. It was the intention of Congress to give the State *full freedom in these matters.* Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering, and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the exercise by the State of its regulatory functions, the jurisdiction

of the Federal Power Commission does not attach" (331 U.S. at 690) (emphasis supplied).

One of the powers which the States may exercise in the interests of conservation is the power to establish minimum prices at which gas may be produced. That power extends to and has been exercised by Oklahoma as to *the sales to Panhandle Eastern and Michigan-Wisconsin here involved.*

In *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.,* 340 U.S. 179 (1950), this Court sustained the power of Oklahoma, one of the Petitioners here, to prevent waste by requiring a minimum price for gas, even where the gas is sold in interstate commerce. That minimum price was established in the Guymon-Hugoton Field of Oklahoma from which the gas sold by Phillips to Panhandle Eastern is in part produced (R. 1695). Since the decision in the *Cities Service* case, Phillips has also begun its sale to Michigan-Wisconsin of gas produced in part from the same field (R. 1691), and that gas is likewise subject to Oklahoma's minimum price regulation.[28]

This Court has always been consistent in upholding State powers with respect to the conservation of oil

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[28] The Court of Appeals purported to distinguish the *Cities Service* case on the ground that it involved only sales at the wellhead. But the Court of Appeals overlooked the fact that in a companion case, decided the same day and arising out of the same proceeding, this Court held that Oklahoma's power is not limited because the first sale occurs at the conclusion of gathering. Phillips Petroleum Company v. Oklahoma, 340 U.S. 190 (1950). True, in that case Phillips did not argue in this Court that Oklahoma's order violated the Commerce Clause of the Federal Constitution, but this Court's decision in the *Cities Service* case shows that it would have been unsuccessful had it done so.

and gas. *Railroad Commission* v. *Rowan & Nichols Oil Co.*, 310 U.S. 573 (1940); *Cities Service Gas Co.* v. *Peerless Oil and Gas Co., supra.* And in all the Court's decisions under the Natural Gas Act there is clear and consistent recognition of the exclusive State position in the field of conservation of oil and gas. *Federal Power Commission* v. *Panhadle Eastern Pipe Line Co.*, 337 U.S. 498 (1949); *Interstate Natural Gas Co.* v. *Federal Power Commission, supra; Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507 (1947). The Court of Appeals, however, now says that the States may not seek to conserve their gas in a way which this Court has upheld. The power to further conservation through minimum price, so recently approved by this Court, is emasculated by the Court of Appeals. The Court was not content to rest its decision on its conclusion that the finding of conflict with State authority was immaterial, but went on to say that it did not imply that it believed the finding by the Commission supportable, and said:

> "On the contrary, as the Supreme Court has held, federal protection of consumers against exorbitant rates is not inconsistent with the exercise by the producing state of its regulatory functions. *Interstate Natural Gas* case, *supra.*" (R. 1863-1864, note 11)

Nothing in the *Interstate* case supports that statement. On the contrary, this Court clearly said that under specified circumstances of conflict jurisdiction of the Federal Power Commission does not attach.

In intervening and presenting our evidence in this case, we are not unmindful of the standard announced by Mr. Chief Justice Vinson in the *Interstate* case:

> "But such conflict must be clearly shown. * * * It is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases local interests may in some degree be affected."

Petitioners are convinced that their evidence showing that federal regulation of the sales here involved will conflict with their respective conservation powers fully meets this test. We earnestly urge the Court to review that evidence, for we believe firmly that it affords a substantial basis for upholding the order of the Federal Power Commission.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted and that the decision of the Court of Appeals should be reversed.

JOHN BEN SHEPPERD
Attorney General of Texas

CHARLES E. CRENSHAW
Special Assistant Attorney General

Attorneys for Petitioners
State of Texas and
Railroad Commission of Texas

MAC Q. WILLIAMSON
Attorney General of Oklahoma

FLOYD GREEN
Conservation Attorney for
State of Oklahoma

Attorneys for Petitioner
Corporation Commission
of Oklahoma

RICHARD H. ROBINSON
Attorney General for New Mexico

GEORGE A. GRAHAM
Special Assistant Attorney General

L. C. WHITE

Attorneys for Petitioners
State of New Mexico and
Oil Conservation Commission of
New Mexico

APPENDIX A

NATURAL GAS ACT

[Public—No. 688—75th Congress]
[Chapter 556—3d Session]
[H. R. 6586]

AN ACT

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Necessity for Regulation of Natural-Gas Companies

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

SECTION 2. When used in this act, unless the context otherwise requires—

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(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

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Extension of Facilities; Abandonment of Service

SECTION 7. * * *

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: * * *